Supreme Court, U.S.
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No. 08-507

IN THE
Supreme Court of the United States

RICHARD SHARIF, ET AL.,

Petitioners,

v.

WELLNESS INTERNATIONAL NETWORK, LTD., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit acted within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling a discovery motion for failure to follow local filing rules, without prejudice to resubmitting the motion in proper form.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's unpublished decision is not in conflict with a decision of this Court or a Court of Appeals.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the district court's proper enforcement of a local rule is not a case of first impression meaningful enough to merit this Court's review.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Wellness International Network, Ltd. does not have a parent corporation and there is no publicly held company that owns a 10% or greater interest in the company.

Respondent WIN Network, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The position in which Petitioners find themselves is self-inflicted, and ultimately doomed by a complete lack of a meritorious lawsuit. After half-heartedly pursuing groundless claims against Respondents in two different forums over the course of five years, Petitioners willfully chose not to re-file a motion for extension of time with a proper certificate of conference, despite being twice afforded the opportunity to do so by the district court. Petitioners have not lost rights because of a nonwillful failure to comply with local rules, toward which the savings clause of Federal Rule 83(a)(2) is directed. Rather, Petitioners consciously and repeatedly chose to ignore the district court's direction to follow its local filing rules. Petitioners continue to waste time and judicial resources by trying to blame everyone but themselves for the long overdue dismissal of this lawsuit.

Moreover, Petitioners' failure to follow local filing rules has only peripheral, if any, bearing on the dismissal of Petitioners' claims. When Respondents moved for summary judgment on the grounds that, *inter alia*, Petitioners had no evidence to support any of their claims, Petitioners responded with no evidence whatsoever. Petitioners submitted no affidavits, no declarations, no deposition transcripts,

no documents, no reports, and no tangible items – indeed make no effort at all to save their claims against summary judgment. As Petitioners themselves note, the district court granted summary judgment against them on two grounds, one being their deemed admissions, and the second being their failure to point to any evidence that would support a finding in their favor at trial. Both are due to Petitioners' own willful conduct. Petitioners failed to timely respond to discovery, resulting in admissions being deemed against them as a matter of law. After twice failing to properly re-file their request for extension of time to respond to the request for admissions, Petitioners inexplicably waited three months to move to vacate the deemed admissions. In their motion to vacate, Petitioners made no attempt to meet their burden of showing that the presentation of the merits would be promoted by having their deemed admissions withdrawn. In response to Respondents' motion for summary judgment, Petitioners offered no evidence.

In short, Petitioners provided no possible grounds on which the district court could have granted their motion to vacate deemed admissions, nor any grounds on which the district court could have ruled in their favor on summary judgment. The district court did not dismiss Petitioners' claims because Petitioners failed to comply with a local filing rule; the district court dismissed Petitioners' claims because Petitioners failed to meet their burdens throughout the motion practice in this case. Petitioners' dilatoriness and apathetic failure to establish any merit to their claims more than gently describes the entire tenor of their lawsuit, which the

district court correctly dismissed and the Fifth Circuit aptly described as "feckless."

This Court should deny Petitioners' petition because the Fifth Circuit's affirmation of dismissal is correct, it does not stray from the accepted and usual course of judicial proceedings, and it is an unpublished opinion with no precedential import. There is no conflict within the circuits to resolve, nor is this a case of first impression on an important issue of law.

STATEMENT OF THE CASE

A. District Court Proceedings

After unsuccessfully attempting to sustain a lawsuit in Illinois in violation of the venue clauses in their contractual agreements, Petitioners Richard Sharif, Waqar and Shafqut Khan, and Abdul and Shaheen Rashid ("Petitioners") filed a complaint on July 8, 2005, in the United States District Court for the Northern District of Texas against Respondents Wellness International Network, Ltd., WIN Network Inc., Ralph Oats, Cathy Oats, and Sheri Matthews ("Respondents" or "WIN"), asserting declaratory judgment actions and other claims in an attempt to avoid their contractual obligations with Wellness International Network, and seeking damages of almost $1 million.

Petitioners subseque ntly filed an Unopposed Motion to Stay the Texas action, pending the outcome of an appeal of the dismissal of the improper lawsuit filed by Petitioners against Respondents in the Northern District of Illinois. On December 29, 2005, the district court granted the Unopposed Motion to Stay the instant case. The Seventh Circuit affirmed the dismissal of the Illinois action for improper venue. *See Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006).

On July 27, 2006, the Texas district court lifted the stay and, shortly thereafter, issued a Scheduling Order on August 22, 2006. Respondents timely served their Initial Disclosures pursuant to FED. R. CIV. P. 26(a). Petitioners never served their

Initial Disclosures. At no point in the case did Petitioners propound written discovery, designate any experts, request any depositions, or otherwise conduct any other discovery.

On November 20, 2006, Respondents se rved written discovery requests on Petitioners, including requests for admissions to each Petitioner. The deadline for Petitioners to respond to these requests was December 20, 2006. On that day, Petitioners filed a motion for extension of time (hereinafter "Motion for Extension") to respond to the written discovery in its entirety by 60 additional days. The district court ordered the district clerk to unfile the request on January 5, 2007, noting that Plaintiffs' motion failed to abide by N.D. TEXAS LOCAL RULES in two respects: by failing to include a certificate of conference and by failing to include a certificate of service. A Notice of Deficiency from the clerk to Petitioners identified exactly what was missing from Petitioners' motion, and cited the governing local rule.

On January 9, 2007, Petitioners re-filed a renewed motion for extension of time (hereinafter the "Renewed Motion") (Both the Motion for Extension and Renewed Motion for Extension are sometimes hereinafter referred to as the "Extension Motions."), but again failed to include a certificate of conference. Accordingly, the district court ordered the clerk to unfile the Renewed Motion on January 11, 2007. Again the clerk sent Petitioners a Notice of Deficiency.

Rather than simply remedying the easy-to-cure defect, Petitioners chose to ignore the Notice of

Deficiency and made no further attempts to request an extension of time to respond to discovery. At no time did Petitioners file a renewed motion containing the required certificate of conference.

Instead, three months after the request for admissions were due, Petitioners filed a Motion to Vacate Alleged Defaulted Admissions ("Motion to Vacate") on March 22, 2007. In the Motion to Vacate, Petitioners quoted the text of FED. R. CIV. P. 36(b), but made no attempt to meet their burden of demonstrating that the presentation of the merits would be promoted by withdrawal of the deemed admissions, or demonstrate how the requirements of Rule 36(b) applied in this case. Petitioners also failed to explain why they could not timely respond to the requests for admissions by the original due date (December 20, 2006), or by the date requested in their unfiled Extension Motions (February 12, 2007).

Rather than explaining their dilatoriness and attempting to meet their burden on a Rule 36(b) motion, Petitioners bemoaned the unfiling of their Extension Motions and made the incorrect, inconsequential argument that deemed admissions are not automatic but require court order. The Motion to Vacate was referred to Magistrate Judge Paul Stickney, who rightly denied the motion on April 12, 2007. Resp. App. 1-2. Petitioners did not appeal the denial of their Motion to Vacate to the Fifth Circuit.

On April 22, 2007, Petitioners filed an Objection to the Magistrate Judge's ruling on their Motion to Vacate. The district court overruled Petitioners' objections on May 7, 2007, ruling that

Petitioners failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law. The district court specifically noted it was not the court's unfiling of Petitioners' Extension Motions that caused admissions to be deemed against them, but Petitioners' failure to correct the filing defect and their failure to timely move to vacate the admissions:

> Plaintiffs miss the point. Plaintiffs had admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions. At no point did the Court inform Plaintiffs that they could not file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district. Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision and for their own lack of diligence in ultimately

> moving to vacate their deemed admissions.

Resp. App. 14-15.

The district court made clear that, had Petitioners properly filed an extension motion, it "assuredly" would have granted it and that Petitioners' counsel made the intentional choice not to do so. *Id.* Petitioners did not appeal the district court's overruling of their objections to the Fifth Circuit.

On May 9, 2007, the district court granted, in part, Respondents' Motion to Dismiss, filed back in August 2005. The district court dismissed all claims asserted by Soad Wattar, Haifa Kaj, and Ragda Sharifeh for lack of standing and failure to state a claim. The Court also dismissed with prejudice all claims asserted against Sheri Matthews for failure to state a claim. It dismissed without prejudice all claims asserted against Cathy Oats for failure to comply with FED. R. CIV. P. 9(b). The district court also dismissed without prejudice all claims asserted against Ralph Oats for failure to comply with FED. R. CIV. P. 9(b), except for certain allegations made in connection with Petitioners' common law fraud claim. The Court also dismissed without prejudice Petitioners' RICO claims in their entirety for failure to meet the heightened pleading requirements of Rule 9(b) and for failure to state a claim. The Court gave Petitioners 15 days to, "consistent with Rule 11 of the federal rules, file an amended complaint if they so choose in compliance with the particularity requirements of Rule 9(b) and Fifth Circuit case law

and the requirements necessary to state a valid RICO claim." Resp. App. 43.

Petitioners did not appeal the Court's ruling on the Motion to Dismiss to the Fifth Circuit.

On May 24, 2007, Petitioners filed a First Amended Complaint, asserting two causes of action: (1) violation of the Texas DTPA, and (2) "RICO claims," asserting violations of 18 U.S.C. §§ 1962(a)-(c). On June 5, 2007, Defendants filed a Partial Motion to Dismiss the First Amended Complaint, for failure to comply with Rule 9(b) and failure to state a claim under Rule 12(b)(6).

On June 11, 2007, Respondents filed a Motion for Summary Judgment as to all remaining claims, based on, *inter alia*, the following grounds: (1) Petitioners' deemed admissions either negated the existence of a material element on each of Petitioners' claims, or established that there was no evidence to support one or more essential elements on each of Petitioners' claims; and (2) no evidence existed to support any of Petitioners' claims.

On July 3, 2007, Petitioners filed a four-page response to the Motion for Summary Judgment, with no supporting evidence of any kind. Petitioners did not respond to Respondents' arguments, nor did they attach any evidence to their response. Petitioners did not request additional discovery to respond to the summary judgment motion, as permitted by FED. R. CIV. P. 56(f).

Having been presented with no grounds on which it could deny summary judgment, on July 16,

2007, the district court granted Respondents' Motion for Summary Judgment on all claims. The district court based its ruling on two grounds: (a) that the deemed admissions negated the existence of a material element on each of Petitioners' claims; and (b) Petitioners failed to point to any evidence that would support a finding in their favor at trial. Resp. App. 51-56. Both reasons for granting summary judgment are traceable to Petitioners' own conduct. Petitioners' dilatoriness in discovery resulted in admissions being deemed against them. Petitioners' failure to proffer proper argument or evidence to meet their burden on a Rule 36(b) motion resulted in the denial of their Motion to Vacate the deemed admissions. Petitioners' deemed admissions, together with their failure to offer any evidence to refute Respondents' summary judgment motion, sounded the death knell of dismissal for their claims.

Petitioners did not appeal the district court's ruling on Respondents' Motion for Summary Judgment to the Fifth Circuit.

B. Petitioners' Appeal to the Fifth Circuit

Petitioners appealed the judgment to the United States Court of Appeals for the Fifth Circuit. Petitioners' sole issue on appeal was whether the district court abused its discretion "when it ordered the clerk of the district court to unfile [Petitioners'] motion seeking an extension of time to comply with [Respondents'] request for admissions and other discovery materials arising from [Petitioners'] technical non-compliance with Local Rule 7.1(b)(1), because the [Petitioners] advised the district court in said motion that [Respondents' counsel] opposed said

motion, rather than, attaching a separate certificate of conference to said motion." Petitioners did not appeal any of the fatal dispositive motions ruled on by the district court.

Petitioners failed to meet a number of briefing deadlines in the Fifth Circuit, a fact not unnoticed by that Court. When briefing was complete, the Fifth Circuit condemned Petitioners' lawsuit as "feckless" and "contumacious" and their performance as "hollow posturing":

> A review of the record on appeal demonstrates that [Petitioners'] untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by [Petitioners] and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate [Petitioners'] feckless litigation at the obvious cost of time and money to the [Respondents] by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of [Respondents'] motion for attorney's fees. In so doing, we caution [Petitioners] that any further efforts to prolong or continue proceedings in this

> court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Pet. App. A-2. *See also Sharif v. Wellness Int'l Network, Ltd.*, 273 Fed. Appx. 316, 316 (5th Cir. 2008) (unpublished).

Following the fifth Circuit's remand for consideration of Respondents' attorneys' fees as noted above, the district court awarded Respondents $655,596.13.[1] With respect to the instant petition for writ of *certiorari*, Petitioners attempted unsuccessfully to file it twice, once in July 2008 and again in September 2008. On both occasions, the Supreme Court clerk returned the pleading to Petitioners' counsel for failure to comply with Supreme Court Rules.

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[1] Incredibly, despite having filed no response to the motion for attorney fees, Petitioners have appealed this award to the Fifth Circuit.

ARGUMENT

I. Petitioners have not presented compelling reasons to grant the Petition, where the Fifth Circuit acted within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling a discovery motion for failure to follow local filing rules, without prejudice to resubmitting the motion in proper form.

Petitioners argue the district court's enforcement of its local filing rule requiring a certificate of conference contravenes Federal Rule of Civil Procedure 83(a)(2). It does not.

As an initial matter, Petitioners have not preserved this point for appeal. Petitioners did not bring a Rule 83(a)(2) argument before the Fifth Circuit. Nowhere in their appellate brief to the Fifth Circuit did Petitioners cite Rule 83, nor did they make an argument based on Rule 83 to the district court. Therefore, Petitioners have waived this argument and their petition for writ of certiorari may be denied on this ground alone. Nonetheless, Respondents will address Petitioners' argument that N.D. Texas Local Rule 7.1(b) contravenes Federal Rule of Civil Procedure 83(a)(2).

Local Rule 7.1(b)(1) of the Northern District of Texas requires a certificate of conference be included with all non-dispositive motions.[2] Pleadings that do

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[2] Local Rule 7.1(b)(1) states: "Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed."

not conform with the local rules may be stricken at the discretion of the court. *See Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir.1990).

Federal Rule of Civil Procedure 83(a)(2) states that: "[a] local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a *nonwillful* failure to comply with the requirement." FED. R. CIV. P. 83(a)(2) (emphasis added). Rule 83(a)(2)'s proscription only applies to nonwillful conduct, and not if a party "contumaciously or willfully violates a local rule." FED. R. CIV. P. 83, Advisory Committee Notes on the 1995 Amendment (1995). When a court strikes a pleading for failure to follow a local rule, repeatedly invites the party to refile the pleading to conform with local rules, and the party chooses not to do so, such noncompliance can hardly be described as "nonwillful." *See, e.g., Daily v. Municipality of Adams County*, 117 Fed. Appx. 669, 672 (10th Cir. 2004) (unpublished) (magistrate judge properly struck complaint not filed on court-approved form, where court asked plaintiff two previous times to submit complaint on proper form).

Petitioners do not make a facial invalidity claim – as they cannot – because Local Rule 7.1(b)(1) does not facially require enforcement in a manner dependent on the willfulness of a non-compliant filer.

Nor is Local Rule 7.1(b)(1) invalid as applied in this case. Local Rule 7.1(b)(1) was not enforced by the district court in a manner that caused Petitioners to lose rights, nor was Petitioners' failure to comply nonwillful. The district court enforced Local Rule 7.1(b)(1) by twice unfiling Petitioners' Extension

Motion and inviting Petitioners to re-file it in compliance with local rules by attaching a certificate of conference. The district court provided Petitioners with a Notice of Deficiency stating exactly what was missing and citing Local Rule 7.1(b)(1). The district court took no action to preclude Petitioners from making further attempts to file their Extension Motion in compliance with the local rules. The district court itself stated: "[a]t no point did the Court inform Plaintiffs that they could not file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district." Resp. App. 15. None of these actions caused Petitioners to lose rights. Petitioners fail to point to any right lost by the act of unfiling a motion without prejudice as to re-filing. The Rule 83(a)(2) inquiry could end here, as it is clear the district court did not enforce Local Rule 7.1(b)(1) in a manner that caused Petitioners to lose rights.

Yet there is a further reason why Petitioners' Rule 83(a)(2) argument fails. Namely, Local Rule 7.1(b)(1) was not enforced in a manner that could have caused a loss of rights *because of a nonwillful failure to comply*. Rule 83(a)(2) has been routinely interpreted to only apply to nonwillful failures to comply with a requirement of form. *Daily*, 117 Fed. Appx. at 671-72; *Futoma v. City of Hartford*, No. 99-7984, 2000 U.S. App. LEXIS 5768, at *2 (2d Cir. 2000) (unpublished).

It is clear from the record that Petitioners' failure to comply with the certificate of conference

requirement was willful. It was incumbent upon Petitioners to correct the deficiency in their certificate of conference and re-file their Extension Motion. If any confusion remained after the clerk's two deficiency notices, a telephone call to the clerk would have answered any question as to how to attach a certificate of conference. As the district court stated in its order, "Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision . . ." Resp. App. 15. Petitioners chose not to correct the certificate of conference error and chose not to re-file their Extension Motion. Petitioners' failure to comply with Local Rule 7.1(b)(1) was willful. There is no violation of Federal Rule 83(a)(2) because, by its own language, Rule 83(a)(2) applies only to a nonwillful failure to comply with local rules.

Petitioners argue they were in technical compliance with Local Rule 7.1(b)(1) because buried within the body of the motion was a statement indicating that "Defendants intend to oppose Plaintiffs' Motion . . . ." Petitioners also complain that the district court granted their motion to extend a court-ordered mediation deadline, which had the same defect. These arguments are immaterial because they do not relate to Federal Rule 83(a)(2) in any manner and therefore have no bearing on the two questions presented by Petitioners' petition. These arguments do not change the fact that the district court did not cause Petitioners to lose any rights and that Petitioners' failure to comply with local rules was willful.

In addition to being immaterial to the issues presented, these two arguments are meritless in their own right. The district court rejected both arguments, explaining that certificates of conference are required to be separate statements appearing at the end of motions so that they can be easily seen by court staff, and that the court's acceptance of one deficient filing does not excuse compliance with the local rules on other filings:

> [Petitioners] point out that both of their motions did inform the Court that the motions were opposed, although they concede that they failed to file a separate certificate of conference as required by Local Rule 7.1(b). . . . The certificate of conference requirement is not a mere idle requirement intended to serve as a technical trap for unwary litigants. Rather it is designed to encourage parties to resolve disputes without requiring court intervention and to give instant notice to the court as to whether a particular motion is opposed so that it may either take action on the motion expeditiously or await a response from the opposing side. The latter function is impeded when the results of a conference are reported within the body of the motion as opposed to in a separate certificate.
>
> [Petitioners] point out that the Court granted their motion to extend the mediation deadline, filed the same day as their original Motion to Extend,

> despite the fact that such motion, like their Motion to Extend, failed to include a certificate of conference. In the motion to extend the mediation deadline, however, [Petitioners] informed the Court of [Respondents'] non-opposition on the first page of the motion as opposed to the second and third pages as done in the Motions to Extend. Thus, the Court could more easily ascertain whether the motion to extend the mediation deadline was opposed without having to read through the entire motion. In any event, simply because the Court granted one motion that did not technically comply with the local rules did not absolve [Petitioners] from complying with the local rules with respect to other motions.

Resp. App. 15-16.

II. Petitioners have not presented compelling reasons to grant the Petition, where the Fifth Circuit's unpublished decision is not in conflict with a decision of this Court or a Court of Appeals.

Petitioners contend that the Fifth Circuit's ruling is "in direct conflict" with an unpublished decision by the Third Circuit, *Construction Drilling, Inc. v. Chusid.* Petitioners' argument with respect to *Chusid* is entirely baseless. *Chusid* involved neither Local Rule 7.1(b)(1) nor Federal Rule 83(a)(2).

Chusid involved whether a New Jersey district court erred in denying *Chusid's* Rule 60(b)(6) motion, as Chusid claimed that a Texas district court's purported failure to follow its own local rules violated his due process rights by granting a motion before the 20-day deadline for filing a response. *Construction Drilling, Inc. v. Chusid*, 131 Fed. Appx. 366, 372 (3d Cir. 2005) (unpublished).[3] The Third Circuit rejected Chusid's argument and affirmed the New Jersey district court's judgment. *Id.* at 373. Petitioners' argument appears to be that because *Chusid* mentions N.D. Texas Local Rule 7.1 in some manner, even though regarding an entirely different and unrelated subsection, it has an outcome-dispositive bearing on this appeal. Petitioners' argument is so attenuated as to be non-existent. *Chusid* simply has no content regarding Local Rule

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[3] N.D. TEXAS LOCAL RULE 7.1(e) sets a 20-day deadline for a respondent to file a response and brief to an opposed motion, and has nothing to do with the certificate of conference requirement of Local Rule 7.1(b)(1).

7.1(b)(1) nor any content regarding Federal Rule 83(a)(2) and, as such, has no bearing on this case.

There is no split of authority among the circuit courts on whether Rule 83(a)(2) precludes a district court from unfiling without prejudice motions that do not comply with local rules, and requesting that the party re-file the motion in conformity with the local rules.

In conclusion, Petitioners' argument is without merit. The district court's enforcement of Local Rule 7.1(b) requiring a certificate of conference does not contravene FEDERAL RULE OF CIVIL PROCEDURE 83(a)(2). Rule 83(a)(2) requires that local rules not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. Here, the district court took no action that caused Petitioners to lose rights, and Petitioners' failure to comply with the local rule at issue was willful. Petitioners' other arguments are immaterial to Rule 83(a)(2) and also fail in their own right. The Fifth Circuit acted well within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling without prejudice Petitioners' Extension Motions for failure to include a proper certificate of service. There is no split of authority among the circuit courts regarding any of these issues.

III. Petitioners have not presented compelling reasons to grant the Petition, where the district court's proper enforcement of a local rule is not a case of first impression meaningful enough to merit this Court's review.

Petitioners purport that this is a case of first impression because this Court has never addressed whether a district court may enforce a local rule in a manner that causes a party to lose rights contrary to Federal Rule of Civil Procedure 83(a)(2). While it may be true that this Court has never addressed this issue, it need not do so now because the instant case does not present this issue. As discussed in the previous section, the district court did not enforce Local Rule 7.1(b)(1) in a manner that caused Petitioners to lose rights, nor was Petitioners' violation of local rules nonwillful such that Rule 83(a)(2) could even be invoked.

Petitioners' own errors and self-inflicted damage to their case does not present a case of first impression to this Court, and have already cost Respondents, the Fifth Circuit, and the district court inordinate and unnecessary time and resources.

Each "loss of rights" complained of by Petitioners is attributable to their own actions. The district court granted summary judgment against Petitioners on two grounds: their deemed admissions and their failure to point to any evidence that would support a finding in their favor at trial. Both are due to Petitioners' own conduct.

Petitioners made no effort to respond, propound, or cooperate in discovery. Petitioners failed to timely respond to discovery, resulting in admissions being deemed against them as a matter of law. Although Petitioners attempted to file Extension Motions, the mere filing of an extension request does not excuse a party's discovery obligations and the consequences of failing to timely meet such discovery obligations are attributable to the party:

> The consequence for failing to meet a deadline falls upon the party who missed the deadline. A party takes a significant risk when it seeks an extension of a deadline close to the actual deadline. Such risks include: (1) that the motion will be denied so that the party will have little or no time to meet the deadline; or (2) that the party will not receive timely notice of a decision and thus will be unable to meet the deadline.

Price v. United Guar. Residential Ins. Co., 2005 U.S. Dist. LEXIS 24762, at *8-*9 (N.D. Tex. 2005) (Fish, .J.) (unpublished).

After twice failing to properly file their Extension Motion seeking more time to respond to the requests for admissions, Petitioners willfully chose not to re-file the Extension Motion. Petitioners then inexplicably waited three months to move to vacate the deemed admissions. As the district court succinctly explained, Petitioners' own willful lack of

diligence caused admissions to be deemed against them:

> Plaintiffs had admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions.

Resp. App. 14-15.

Thereafter, in their motion to vacate the deemed admissions, Petitioners made no attempt to meet their burden of showing that the presentation of the merits would be promoted by having their deemed admissions withdrawn, as required in a Rule 36(b) motion to vacate. In failing to do so, Petitioners provided no grounds on which the district court could have granted their motion to vacate.

Subsequently, in response to Respondents' motion for summary judgment, Petitioners offered no evidence. Petitioners submitted no affidavits, no declarations, no deposition transcripts, no documents, no reports, nor any tangible items. As with their motion to vacate, Petitioners provided the district court with no grounds on which it could have denied Respondents' motion for summary judgment. Petitioners did not challenge any of these rulings on appeal to the Fifth Circuit.

The situation Petitioners found themselves in was entirely one of their own creation.[4] It is not the function of the courts to save litigants from themselves. *Cf. In re Pub. Offering Sec. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007) (It is not appropriate for a court "to provide legal advice to experienced . . . litigators."). Petitioners' self-immolation of their own frivolous case does not present a case of first impression for this Court.

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[4] Petitioners made three attempts to submit a petition for writ of certiorari to this Court in proper form. If they gave up after the second unfiling, as they did in the district court, Petitioners would hardly be in a position to claim that the Supreme Court's Rules on the forms of writs of certiorari denied them any legal rights.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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